No. 45491-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE CRUZ CAMACHO,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-01854-7
The Honorable Ronald Culpepper & Stanley Rumbaugh, Judges

OPENING BRIEF OF APPELLANT CAMACHO

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2. The trial court erred when it upheld the warrant to search vehicles and an apartment connected to Guadalupe Cruz Camacho and his co-defendants.

3. The warrant to search vehicles and an apartment connected to Guadalupe Cruz Camacho and his co-defendants was invalid because the application for the warrant relied on the results of an unconstitutional canine sniff search.

4. The warrant to search vehicles and an apartment connected to Guadalupe Cruz Camacho and his co-defendants was invalid because the application did not provide the magistrate with reliable facts sufficient to establish probable cause.

5. By admitting evidence seized pursuant to an unconstitutional warrant, the trial court violated Guadalupe Cruz Camacho's rights under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution.

6. Guadalupe Cruz Camacho was denied his right to effective assistance of counsel when his attorney failed to argue that his two convictions for unlawful possession of a controlled substance with intent to deliver were the same criminal conduct for the purpose of calculating Camacho's offender score.

7. The trial court erred in finding that Appellant had the present or future ability to pay discretionary legal financial obligations.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it denied Guadalupe Cruz Camacho's motion to suppress the evidence found during a

search of vehicles and an apartment connected to Camacho and his co-defendants, where the application relied on the results of an unconstitutional canine sniff search? (Assignments of Error 1, 2, 3, & 5)

2. Does a warrantless canine sniff of a closed automobile violate the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution, where an individual has a heightened privacy interest in his automobile and its contents, where the odors inside the automobile are detected not by a police officer using his own senses but instead by a tool (a canine) that enhances the officer's sense of smell, and where the sniff search is just as likely to reveal the presence of private and legal non-contraband items as it is to reveal contraband? (Assignments of Error 1, 2, 3, & 5)

3. Did the trial court err when it denied Guadalupe Cruz Camacho's motion to suppress the evidence found during a search of vehicles and an apartment connected to Camacho and his co-defendants, where the facts in the application failed to establish that canine sniff searches are reliable or that the canine used in the instant case was reliable? (Assignments of Error 1, 2, 4, & 5)

4. Where probable cause supporting a search warrant must be based on real facts and "reasonably trustworthy information," is an alert from a drug-detecting dog insufficiently reliable to establish probable cause when there is overwhelming evidence that even highly trained narcotics-sniffing dogs have high error rates, often alert to non-contraband, are highly susceptible to cueing from their handlers, and often give positive alerts when there is a residual odor but no actual narcotics present? (Assignments of Error 1, 2, 4, & 5)

5. Once the facts relating to the canine's positive alerts during the sniff searches are excised from the search warrant application, are the remaining facts sufficient to establish probable cause for a search warrant, where those facts are stale, merely suspicious, or consistent with non-criminal behavior? (Assignments of Error 1, 2, 3, 4, & 5)

6. Where Guadalupe Cruz Camacho's possession of the two controlled substances occurred at the same time and place and involved the same victim, and where established case law provides that multiple convictions for simultaneous possession of more than one controlled substance are the same criminal conduct, was Camacho denied his right to effective assistance of counsel when his attorney failed to argue that Camacho's two unlawful possession with intent to deliver convictions were the same criminal conduct for the purpose of calculating Camacho's offender score? (Assignment of Error 6)

7. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Guadalupe Cruz Camacho's sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 7)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Guadalupe Cruz Camacho by Information with two counts of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401). (CP 1-2) The State alleged that the crimes were aggravated because they were major violations of the Uniform Controlled Substances Act (UCSA) (RCW 9.94A.535(e)). (CP 1-2) Two co-defendants, Javier Espinoza and Gerardo Rafael Hernandez, were also charged. (CP 1-2)

Camacho joined in a joint motion to suppress evidence collected in cars and apartments during the execution of a search

warrant. (Espinoza CP 171-266; 06/03/13 RP 64-69)[1] Camacho challenged the sufficiency of the application for the search warrant on several grounds, including the affiant officer's reliance on a confidential informant and the use of a K9 to sniff for the presence of any controlled substances in the cars or apartment. (Espinoza CP 171-266; 06/03/13 RP 55-83) Following a multi-day hearing, Judge Ronald Culpepper orally denied the motion to suppress.[2] (06/07/13 RP 6-21)

The State filed an amended Information just before the start of trial. The Amended Information removed the allegation that the crimes were major violations of the UCSA, and added an allegation that the crimes occurred within 1,000 feet of a school bus stop, potentially subjecting Camacho to a 24-month sentence enhancement (RCW 9.94A.533(6). (CP 41-42) However, the State continued to pursue both the school bus enhancement and the major violation of the UCSA aggravator. (2RP 9-10, 15-16, 22-24; 8RP 28-30, 36; CP 87-90, 101)

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[1] The transcripts labeled volumes I through X will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

[2] Three days of this hearing were unable to be transcribed after the court reporter's equipment failed to record the proceedings. (09/25/14 RP 6-8) The trial prosecutor and the trial court have filed affidavits recounting their recollections of the proceedings. (CP 142-52, 155-62)

The jury convicted Camacho as charged on the substantive offenses. (CP 105-06; 9RP 2) The jury also found that the crimes occurred within 1,000 feet of a school bus stop and that the crimes were major violations of the UCSA. (CP 107-10; 9RP 3, 5) Relying on the major violation of the UCSA aggravator, the trial court imposed an exceptional sentence of 96 months. (CP 119, 122; 10RP 18) The court then imposed a 24-months school bus stop enhancement, for a total of 120 months of confinement.[3] (CP 119, 122; 10RP 18) The court also imposed $5,800.00 in legal financial obligations. (CP 120; 10RP 19) This appeal timely follows. (CP 133)

B. SUBSTANTIVE FACTS

In the Spring of 2012, Tacoma Police drug units were involved in investigating a man named Alfredo Flores. (3RP 28) Through electronic and visual surveillance, officers observed that Flores spent about 12 hours at an apartment complex located at 9621 10th Avenue East in Tacoma. (3RP 29; 6RP 66-67) When Flores was arrested during a traffic stop the following day, officers found about four pounds of methamphetamine, almost two pounds of heroin, and

[3] Camacho's standard range, including the 24-month school bus zone enhancement, was 36-44 months. (CP 119)

about $10,000 in cash in his car. (3RP 29-30; 6RP 67)

Based on a tip received six months earlier from a confidential informant, investigators already suspected that apartment number 9 at the 10th Avenue apartment complex was a possible "narcotics stash house." (3RP 29; Exh. D6 at p.3) So after Flores' arrest, investigators immediately decided to begin surveillance of that apartment as well. (3RP 30; 4RP 4-5; 6RP 67, 68)

Officers observed a man, who the confidential informant claimed was drug supplier Guadalupe Cruz Camacho, outside of the apartment working on a blue Nissan and a Ford truck with California license plates. (3 RP 38; 6RP 68-69, 70; Exh. D6 at p.3) Officers also observed a red PT Cruiser, which was registered to Camacho, parked in the same lot. (6RP 68-69, 70; Exh. D6 at p.3) Later, officers observed a group of three to five Hispanic men going back and forth between the apartment and three vehicles; the Ford truck, a Nissan with Oregon license plates, and a Nissan with California license plates. (3RP 30, 31; 6RP 73-74; Exh. 6D at p.4) The men were seen placing packages into the engine compartment and interior doors of the Nissans. (Exh. D6 at p.4)

Officer Henry Betts is part of the K-9 unit. (4RP 18) Officer Betts's dog, Barney, has been trained to detect the odor of narcotics.

Barney has been trained to sit when he catches the odor of narcotics, but Officer Betts testified that sometimes Barney will only exhibit a change in behavior. (06/03/13 RP 17-18; 4RP 23-24) Officer Betts and Barney walked through the parking lot and lingered at the suspected vehicles. (4RP 20-21, 28) According to Officer Betts, Barney exhibited a sit response to the California Nissan and exhibited a change in behavior when they approached the Ford truck. (4RP 28, 30-31)

A short time later, officers observed the two Nissans and the Ford truck leaving the apartment complex at the same time. (3RP 75; Exh. D6 at p.4) Officers initiated a traffic stop of the vehicles and detained the occupants. (6RP 75) Camacho was driving the Ford truck. (3RP 38-39; Exh. D6 at p. 4) The tailgate of the truck appeared to have been recently removed and re-installed. (3RP 39, 45-46) Javier Espinoza was driving the California Nissan. (Exh. D6 at p. 4) Gerardo Hernandez was driving the Oregon Nissan, and was accompanied by his wife and two young children. (3RP 31-32; 4RP 71, 72-73; Exh. D6 at p. 4) Officers noticed a grocery bag filled with cash sitting on the floor of the Oregon Nissan. (3RP 32-33; 4RP 73-74)

Officer Betts arrived at the scene, and directed Barney to sniff

the vehicles. (4RP 32) Barney exhibited a sit response when he sniffed the Nissans and exhibited a change in behavior when he sniffed the tailgate of the Ford truck. (4RP 33-34) Betts also took Barney to the 10th Avenue apartment, and Barney alerted when he sniffed the front door.[4] (Exh. D6 at 5; 4RP 37)

Based on this information, Officer Kenneth Smith obtained a search warrant for the vehicles, the 10th Avenue apartment, and a second apartment he believed had been rented by Hernandez.[5] (Exh. D6; 6RP 75) Despite Barney's earlier alerts, the officers did not find any narcotics or illegal substances inside the Nissans or the Ford truck. (3RP 40, 41-42; 4RP 54) But Barney gave a sit response when he sniffed a bundle of cellophane-wrapped currency, totaling $42,000, which was found in the California Nissan. (3RP 34; 4RP 34; 6RP 24) Officers also counted the cash found in the Oregon Nissan, which totaled $56,544. (6RP 14-15, 16)

Officer Betts took Barney to the 10th Avenue apartment, and Barney alerted to items in a bedroom closet, a dresser, a kitchen

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[4] The trial court later found that this specific sniff alert was an unconstitutional warrantless search, and ruled that the fact of this alert should not be considered in determining whether there was probable cause for the search warrant. (06/07/13 RP 10-11)

[5] The trial court suppressed all evidence located at this second apartment after finding that the search warrant lacked sufficient facts to establish a nexus between this location and the suspected criminal activity. (06/07/13 RP 21)

cabinet, and to a small space between the laundry room wall and the washer and dryer. (4RP 38, 40, 41, 44-45, 45-46 48-49) In these locations, officers found heroin totaling over 8,500 grams, and methamphetamine totaling over 2,000 grams. (4RP 9, 40, 44-45, 45-46, 48-49; 6RP 31-32, 34, 35, 36, 38-39, 41, 48) Officers also found items commonly associated with the distribution and sale of narcotics. (6RP 14, 50, 51)

Camacho had on his person a copy of the key to the 10th Avenue apartment. (6RP 77-78) Officers also found identification for Camacho inside the apartment. (10RP 41; Exh. 64b) And they noticed that Camacho's PT Cruiser had a "hidden compartment" in the hatchback area. (3RP 37)

Officer Jason Catlett testified that there is a hierarchy in the narcotics trafficking trade. In his experience as a member of the Drug Enforcement Agency task force, Catlett has observed that the high level dealers transport narcotics from California by secret compartments in their cars. (5RP 7, 13) Then mid-level dealers usually store large quantities of narcotics for the high level dealers at apartments rented by friends or family unconnected with the narcotics trade. (5RP 12) The mid-level dealers supply smaller amounts of narcotics to "runners," who supply the street level

dealers. (5RP 12-13) Most low or street level dealers carry about one to two ounces (28-56 grams) of heroin or methamphetamine at a time. (5RP 10) An individual would generally carry one to two grams for personal use. (5RP 9-10)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED WHEN IT UPHELD THE SEARCH WARRANT AND DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE GATHERED DURING THE EXECUTION OF THE SEARCH WARRANT.

1. The use of a dog to sniff for narcotics outside of the vehicles constituted a search that, absent a warrant, violated both the Washington State and United States constitutions.

The trial court rejected Camacho's argument that the canine sniffs of the vehicles were warrantless searches, and that the results of those sniffs could not help to establish probable cause for the search warrant.[6] (06/03/13 RP 70-73; 06/07/13 RP 11-12; Espinoza CP 176-78) When reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v.

[6] Camacho has standing to challenge the sniff searches of the vehicles because he is charged with a possessory offense and had dominion and control of the vehicles at the time of the sniff searches (he was observed working on the Ford truck and a Nissan, and seen loading items from the apartment into the vehicles before either sniff search took place). See State v. Kypreos, 115 Wn. App. 207, 211-13, 61 P.3d 352 (2002); State v. Jones, 146 Wn.2d 328, 331-33, 45 P.3d 1062 (2002).

Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).[7]

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Article I, section 7 is a jealous protector of privacy." State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).[8] Thus, subject to a few "jealously and carefully drawn" exceptions, "warrantless searches and seizures are per se unreasonable." State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

In determining whether there has been a search under the Washington Constitution, the relevant inquiry is "whether the State has unreasonably intruded into a person's 'private affairs'." State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). The Washington Supreme Court has held that the intimate details about

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[7] The trial court never entered formal written findings of fact and conclusions of law memorializing its ruling on the defense's motion to suppress.

[8] This section of our constitution provides greater protection to an individual's right of privacy than the Fourth Amendment to the United States Constitution. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Where the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, Article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law." See Valdez, 167 Wn.2d at 772(citing York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 305-06, 178 P.3d 995 (2008)). "This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional." Valdez, 167 Wn.2d at 772.

a person's life, associations, and activities are a "private affair" within the meaning of Article 1 section 7. State v. Jorden, 160 Wn.2d 121, 129, 156 P.3d 893 (2007). "If a search occurs, article 1, section 7, is implicated and police must get a warrant or the search must fall within one of the recognized exceptions to the warrant requirement." State v. Dearman, 92 Wn. App. 630, 633-34, 962 P.2d 850 (1998).

"[W]hen a law enforcement officer is able to detect something by [using] one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a 'search'." Young, 123 Wn.2d at 182 (quoting State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). For that reason, courts have held that a police officer's visual surveillance does not constitute a search if the officer observes an object with unaided eyes from a nonintrusive vantage point. Young, 123 Wn.2d at 182. "This kind of surveillance does not violate article 1, section 7, because what is voluntarily exposed to the general public and observable from an unprotected area without using sense enhancement devices is not part of a person's private affairs." Dearman, 92 Wn. App. at 634 (citing Young, 123 Wn.2d at 182). But "a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a

search." Young, 123 Wn.2d at 182-83 (citing State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991); Seagull, 95 Wn.2d at 901).

In Young, our State Supreme Court held that an infrared device is an intrusive means of observation which exceeds the limits on surveillance under Washington law because it allows police to detect heat distribution patterns undetectable to the naked eye or other senses. Young, 123 Wn.2d at 183; see also Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

Subsequently, in Dearman, Division 1 held that a warrant was required to use a canine sniff at a residence, noting:

> Like an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "'see through the walls' of the home." The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as [the dog]. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog "does expose information that could not have been obtained without the 'device'" and which officers were unable to detect by using "one or more of [their] senses while lawfully present at the vantage point where those senses are used." The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

Dearman, 92 Wn. App. at 635 (footnotes omitted) (citing Young, 123

Wn.2d at 182-83). More recently, the United States Supreme Court also held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment. Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1417-18, 185 L. Ed. 2d 495 (2013).

Washington courts have held in a number of cases that the canine sniff at issue did not violate the defendant's privacy rights. See State v. Stanphill, 53 Wn. App. 623, 631, 769 P.2d 861 (1989) (no search where a canine sniff was conducted on a package at the post office); State v. Boyce, 44 Wn. App. 724, 730, 723 P.2d 28 (1986) (canine sniff of a safety deposit box at a bank did not require a warrant); State v. Wolohan, 23 Wn. App. 813, 820, 598 P.2d 421 (1979) (canine sniff of a package being sent by a common carrier was not an illegal search because the defendant had no reasonable expectation of privacy in the area in which the examined parcel was located). In each of these cases, the courts noted that a canine sniff might constitute a search "if the object or location were subject to heightened constitutional protection." Young, 123 Wn.2d at 188. Thus, whether or not a canine sniff is a search "depends on the circumstances of the sniff itself." Boyce, 44 Wn. App. at 729.

In State v. Hartzell, Division 1 held that a canine sniff near an

open window of the defendant's vehicle was not a search because the canine merely sniffed the air drifting out of the open window, and the officers were at a lawful vantage point at the time. 153 Wn. App. 137, 221 P.3d 928 (2009). The court found that the sniff was minimally intrusive.

This Court should not apply the Hartzell court's reasoning in this case for several reasons.[9] First, the Hartzell court did not seem to recognize that, under the Washington constitution, automobiles receive nearly the same heightened privacy protections as a home or residence:

> We have long held the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents.
>
> More than 75 years ago, in Gibbons, we explicitly recognized the citizens of this state have a right to the privacy of their vehicles.
>
> > We note that the case before us does not involve a search ... in the home of appellant; but manifestly the constitutional guaranty that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," **protected the person of appellant, and the possession of his automobile and all that was in it**, while upon a public street of Ritzville, against arrest and search without authority of a warrant of arrest, or a search warrant, **as fully**

[9] This Court is not bound to follow the Hartzell decision. Because Hartzell is a Division 1 case, it is merely persuasive authority and is not binding on this court. See Joyce v. State, Dept. of Corrections, 116 Wn. App. 569, 591 n.9, 75 P.3d 548 (2003).

> **as he would have been so protected had he and his possession been actually inside his own dwelling**[.]

State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (quoting State v. Gibbons, 118 Wn. 171, 187-88, 203 P. 390 (1922) (quoting Wash. Const. art. I, § 7)) (emphasis in original).

Second, the Hartzell court noted that "Hartzell did not have a reasonable expectation of privacy in the air coming from the open window of the vehicle" and therefore the canine "sniff was only minimally intrusive." 153 Wn. App. at 149. Here, however, the windows were not open when Barney conducted his first sniff search, and Camacho and the other occupants were involuntarily removed from their cars before Barney conducted his second sniff. (06/03/13 59, 4RP 33) By leaving the windows rolled up, Camacho and the other men were choosing not to expose odors from the contents of the vehicles to the air outside. Far from being "minimally intrusive," these two sniff searches invaded an area in which Camacho had a heightened privacy interest, and that Camacho and the other men had intended to keep private and unexposed to the public. Moreover, the officers were not using their own senses, but in essence were using a canine sense enhancement.

Like homes, vehicles are a constitutionally protected area.

Camacho did not voluntarily expose the contents of the vehicles to public view, invite the public to examine the vehicles, or otherwise open his private affairs to the public, or to government-trained police dogs. The entire reason the officers used Barney was because he could reveal information that would clearly not otherwise be legally accessible to the officers.

Furthermore, Hartzell and the other cases that approve of canine sniffs rely on a premise that we now know to be false: that trained narcotics detection dogs reliably alert only to contraband and not to noncontraband items. See Illinois v. Caballes, 543 U.S. 405, 410, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment"); People v. Campbell, 367 N.E.2d 949, 953-54 (Ill. 1977) ("Nothing of an innocent but private nature and nothing of an incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics"); State v. Wolohan, 23 Wn. App. at 820 ("A dog's 'search' is limited solely to illegal substances").

But research has shown that a canine sniff is just as likely to

reveal the presence of noncontraband as contraband. That is because drug detection dogs are not alerting to the illegal drugs. Rather, the dogs are alerting to particular compounds in the drugs, many of which are not illegal.

> Scientific research establishes that instead of smelling cocaine, drug-detection dogs alert to methyl benzoate - an odor shared by snapdragons, petunias, perfumes and food additives. Instead of smelling heroin, drug-detection dogs alert to acetic acid - an odor shared by vinegar and aspirin that is past its prime. Instead of smelling MDMA ("Ecstasy"), drug-detection dogs alert to piperonal - an odor shared by soap, perfume, food additives and even lice repellant. Law enforcement is well-aware of this research and in fact uses these specific, noncontraband molecules and compounds to prepare pseudo drug training aids - devices which train drug-detection dogs and reinforce their field training - to alert to these precise substances, not a more complex odor signature for contraband. And because these shared smells - entirely-lawful odor constituents - are readily found in homes throughout the country, canine drug-detection sniffs may reveal lawful activity within the home.

Leslie A. Shoebotham, *Brief of Amici Curiae Fourth Amendment Scholars in Support of Respondent, State of Florida v. Jardines*, 2012 WL 2641847 at 4 (U.S. 2012).[10]

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[10] See also Kenneth G. Furton, *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction–Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, Journal of Chromatographic Science, Vol. 40, March 2002, at 154 ("When a dog is trained to alert to an item (such as a human body, explosives, munitions, accelerants, drugs, and currency), the dog is often being trained to alert to a scent associated with the item rather than the item itself. That scent is commonly composed of volatile compounds or classes of compounds, which are detected by the dog"); Michael

Caballes takes a contrary position, stating: "The use of a well-trained narcotics-detection dog—one that 'does not expose non-contraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." Caballes, 543 U.S. at 409 (quoting United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)). However, as demonstrated above, the vast majority of sniffs even by well-trained narcotics-detection dogs will expose non-contraband items, and potentially private information, to law enforcement.

Using Barney to sniff the vehicles in this case invaded Camacho's privacy and was therefore a search under Article I, section 7. Because the search was conducted without a warrant or a recognized warrant exception, Barney's alerts should have been suppressed, and were not a proper ground on which to base the subsequent search warrant.[11]

Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab.16 (2008), *available at* http://www.pawsoflife.org/Library/Detection/Marcias.pdf ("It has been shown that canines respond to volatile organic compounds (VOCs) in the headspace above the drug instead of the parent compound itself.").

[11] Pursuant to RAP 10.1(g)(2), which allows a party in a consolidated case to "adopt by reference any part of the brief of another" party, Camacho hereby adopts and incorporates co-Appellant Espinoza's arguments and authorities on this issue (see Espinoza's Appellant's Opening Brief, Issue IV at pages 41-48).

2. Without the evidence of Barney's alerts, Officer Smith's affidavit does not establish probable cause to issue a warrant to search the vehicles and the 10th Avenue apartment.

If information in a warrant affidavit was obtained pursuant to an unconstitutional search, that information may not be used to support the warrant. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). However, a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the improperly obtained information. State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64, 67 (1987). Probable cause exists when the application sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007).

In this case, the remaining facts submitted to the magistrate in support of a warrant to search the cars and the 10th Avenue apartment can be summarized as follows:

> Six months before Camacho's arrest, a confidential informant was at the 10th Avenue apartment and observed a large quantity of methamphetamine and heroin. The confidential informant believed Camacho supplies drugs to Alfredo Flores. Flores spent 12 hours at the 10th Avenue apartment, and the next day he was arrested and found in possession of

> methamphetamine and heroin.
> Camacho was seen at the 10th Avenue apartment, and in the parking lot working on the engine area of a car. Camacho's vehicle was also parked outside the 10th Avenue apartment.
> A group of unidentified men were seen loading packages into several cars the day after Flores was arrested, and later that night the men were seen separately leaving in those cars.
> When the police conducted a traffic stop of those vehicles, they saw a large sum of cash on the floor of one car, and a second car appeared to have had its tailgate recently removed and replaced.

(Exh. D6 at p. 3-4)[12]

In State v. Neth, a police officer had observed "[i]nnocuous objects that are equally consistent with lawful and unlawful conduct," such as empty plastic bags that might be used to store illegal drugs, and Neth admitted he had a large amount of cash in the car. 165 Wn.2d 177, 185, 196 P.3d 658 (2008). The Court held that probable cause to search the automobile was lacking, stating: "These facts are unusual, and, taken together, they seem odd and perhaps suspicious. However, all of these facts are consistent with legal activity, and very few have any reasonable connection to criminal activity." Neth, 165 Wn.2d at 184.

Similarly here, once the evidence gained from the dog alert**s** is excised from the warrant affidavit, the remaining information is

[12] A complete copy of the Complaint for Search Warrant is attached in the Appendix.

simply insufficient to establish probable cause. The remaining facts, while perhaps suspicious, do not give rise to a reasonable inference that Camacho was involved in criminal activity or that evidence of criminal activity could be found in the apartment or vehicles. The narcotics were seen by the confidential informant six months prior. There is no evidence that Flores obtained his narcotics from the 10th Avenue apartment. The officers were unable to see what the packages were, or what they contained, when they were loaded into the vehicles. And there is nothing criminal about carrying a large amount of cash, or about making after-market alterations to one's vehicle.

When an unconstitutional search occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). Because the dog sniffs were unconstitutional searches, and without them the search warrant application was insufficient to establish probable cause, the physical searches of the vehicles and the 10th Avenue apartment were unconstitutional and all evidence gathered as a result must be suppressed. See Neth, 165 Wn.2d at

186.[13]

B. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE BECAUSE THE RELIABILITY OF CANINE SNIFFS IN GENERAL, AND OF BARNEY'S SNIFFS IN PARTICULAR, WAS NOT ESTABLISHED.

The issuance of a search warrant is generally reviewed for abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Deference is normally given to the issuing judge or magistrate. Young, 123 Wn.2d at 195 (citing State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986)). However, the trial court's assessment of probable cause is a legal conclusion that is reviewed *de novo*. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

A judge may issue a search warrant only upon a determination of probable cause. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause must be "grounded in fact" and based on "reasonably trustworthy information." State v. Afana, 169 Wn.2d 169, 182, 233 P.3d 879 (2010); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A basis for probable cause that is based solely on suspicion and belief is legally insufficient. Thein, 138 Wn.2d at

[13] Stating, "these facts did not create probable cause to search Neth's car and the evidence obtained pursuant to the warrant should have been suppressed. Neth's conviction is reversed[.]"

140 (quoting State v. Helmka, 86 Wn.2d 91, 92 542 P.2d 115 (1975)). In this case, the State did not establish that canine sniff alerts in general, and Barney's sniffs in particular, provide reliable facts.

"The infallible dog . . . is a creature of legal fiction . . . their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine . . . In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." Caballes, 543 U.S. at 411-12 (Souter, J. dissenting).[14]

As discussed in detail above, even the best trained canines often alert to non-contraband items. So neither a canine handler, nor a reviewing magistrate, can know if a dog is alerting to the presence

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[14] Citing United States v. Kennedy, 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy rate); United States v. Scarborough, 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); United States v. Limares, 269 F.3d 794, 797 (C.A.7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); Laime v. State, 347 Ark. 142, 159, 60 S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors); United States v. $242,484.00, 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); United States v. Carr, 25 F.3d 1194, 1214-1217 (C.A.3 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency ... is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence").

of contraband or to some other non-contraband substance. But other issues arise that also demonstrate the risk of relying on canine alerts to establish probable cause. For example, whether or not a dog is in fact giving an alert is subjective and open to interpretation by the handling officer. (Exh. D1 at p. 42) See also Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky L.J. 405, 422 (1996) (claiming that "almost all erroneous alerts originate not from the dog, but from the handler's misinterpretation of the dog's signals"). Because the handler's own conscious or unconscious biases could affect both how he interprets the dog's behavior and how the dog behaves, it is critical for the State to show clearly that the dog is capable of refusing to alert when appropriate and in a manner that the handler can understand. See Bird, *supra.* at 422-23; United States v. Trayer, 898 F.2d 805, 809 (D.C. Cir. 1990) (noting, based on expert testimony of a police-dog trainer, that anything "less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the reliability of dog sniffs").

Moreover, significant evidence indicates that dogs can detect trace amounts of narcotics that could be present due to a person having recently handled or been around narcotics, or that dogs may

alert to the residual odor when the narcotics are no longer present. See e.g. Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313, 317 (5th Cir. 1989) (although the dog was trained to detect various contraband, he also was capable of reacting to residual scents lingering for up to four to six weeks); United States v. Carr, 25 F.3d 1194, 1215 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part) (stating that "a substantial portion of United States currency now in circulation is tainted with sufficient traces of controlled substances to cause a trained canine to alert").

Thus, there is a high risk that a canine will alert to the presence of narcotics when there are in fact no narcotics present. The instant case perfectly illustrates this risk. Barney alerted to the presence of narcotics in both Nissans and the Ford truck, yet no narcotics were found within. (3RP 40, 41-42; 4RP 28, 30-31, 33-34, 54) This shows that a canine alert is not a reliable indicator that narcotics or contraband will be found in the place to be searched.

With this in mind, it is easy to see that Officer Smiths' application did not contain sufficient facts to establish that Barney is reliable or that his alerts reliably detect the presence of narcotics.[15]

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[15] See State v. Jackson, 82 Wn. App. 594, 606-07, 918 P.2d 945 (1996) ("the dog's training and track record were known to the police on the scene and were subsequently shown in the affidavit submitted to obtain a search warrant") (citing

The search warrant application stated only that Barney and Officer Betts were certified after completing required training and certification testing; that Barney is trained to detect the odor of five controlled substances; that Barney and Officer Betts continue to do in-service training and maintenance training weekly; and that as a team Barney and Officer Betts had recorded over 20 "finds" in 2012. (Exh. D6 at p.7)

This application says nothing about Barney's actual rate of success or failure. For example, it does not inform the magistrate whether and how often Barney gives false alerts in the field, whether Barney can reliably detect and respond to drugs in the field as he does in training, and fails to verify that Barney will not respond to associate stimuli such as cutting agents. (Exh. D1 p. 7-8)

In fact, Barney does have a history of false alerts and he has not been adequately trained to alert to contraband only, as opposed to items that contain similar compounds. Barney is trained on street drugs retrieved from the property room at the Tacoma Police station.

United States v. Diaz, 25 F.3d 392, 394 (6th Cir.1994) (for a positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established); United States v. Lingenfelter, 997 F.2d 632, (9th Cir.1993) (canine sniff can supply probable cause if the application for the warrant establishes the dog's reliability"); United States v. Florez, 871 F. Supp. 1411, 1423 (D.N.M.1994) (when dog's detection accuracy is credibly challenged, evidence of the dog alerting is insufficient to establish probable cause absent documentation of the dog's accuracy rate, or corroborating evidence of the presence of drugs)).

(CP 151, 158) Officer Betts does not know for certain what substances are in these street drugs because he does not know the results of any tests performed on the substances. (CP 151) Officer Betts does not know what cutting agents were used in any of the training aids. (CP 151) And Barney has not been trained to discriminate cutting agents from contraband. (Exh. D1 at p. 47; CP 151)

Officer Betts also testified that Barney has been known to alert on items that he has not been trained to detect. (06/03/13 RP 9-10, 11, 15; CP 160) Officer Betts does not rely on double-blind exercises when training Barney. (Exh. D1 at p. 42) Officer Betts testified that he interprets changes in Barney's behavior, such as heavier breathing or a wagging tail, as an "alert." (06/03/13 RP 17-18, CP 148) And Officer Betts' instructor has expressed concerns that Barney reacts too frequently to Officer Betts' cues. (06/03/13 RP 7 CP 158)

It is quite clear that canines, including Barney, are not capable of providing humans with reasonably trustworthy information regarding the presence of illegal narcotics. The results of a canine sniff do not reliably indicate that contraband is present or that criminal activity is taking place. While there may be circumstances where law

enforcement's use of canines can be helpful or even essential, establishing probable cause clearly is not one of them.[16]

The fact of Barney's alerts—if that is what they were—at the vehicles are not reliable facts that the magistrate can use to determine whether probable cause exists to support the issuance of a search warrant. That information should have been stricken because it is not "grounded in fact" or based on "reasonably trustworthy information." Afana, 169 Wn.2d at 182; Thein, 138 Wn.2d at 140. And, as argued in the proceeding section, the remaining allegations in the affidavit are insufficient to establish probable cause. Accordingly, the evidence gathered during the execution of the warrant must be suppressed. See Neth, 165 Wn.2d at 186.

C. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO ARGUE THAT CAMACHO'S TWO CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER CONSTITUTED THE SAME CRIMINAL CONDUCT.

Camacho was charged with and convicted of two counts of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401). (CP 41-42) Count one pertained to the

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[16] Pursuant to RAP 10.1(g), Camacho also adopts and incorporates co-Appellant Espinoza's arguments and authorities on this issue (see Espinoza's Appellant's Opening Brief, Issue III at pages 28-41).

possession of methamphetamine, and count two pertained to the possession of heroin. (CP 41-42) At sentencing, each current possession conviction was included in the offender score for the other current possession conviction, and Camacho was sentenced using an offender score of one rather than zero.[17] (CP 119; 10RP 14-15, 18) Camacho's trial counsel did not object to the offender score calculation.[18] (10RP 14-15)

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional

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[17] Camacho has no criminal history. (CP 119)

[18] Trial counsel did file a written memorandum asking the court to find that the two offenses were the same criminal conduct. (CP 111-12) But the argument was not raised or addressed at the sentencing hearing, and the two offenses were not treated as same criminal conduct when the trial court imposed its sentence. (CP 19; 10RP 14-15)

errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

Both prongs of the Strickland test are met here. There is a strong probability that a same criminal conduct argument would have been successful had it been raised, and it was objectively unreasonable not to raise the argument.[19]

RCW 9.94A.589(1)(a) of the Sentencing Reform Act states, in relevant part:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . "Same criminal conduct," as used in

[19] A defendant may raise the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument at sentencing. *See* State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004).

> this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In order for separate offenses to "encompass the same criminal conduct" under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim. State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). The absence of any one of these prongs prevents a finding of same criminal conduct. Vike, 125 Wn.2d at 410. Camacho's two convictions for unlawful possession of a controlled substance with intent to deliver meet all three elements of the same criminal conduct test.

First, the two offenses occurred at the same time and place. All of the methamphetamine and heroin were located within the 10th Avenue apartment. (3RP 40, 41-42; 4RP 9, 38, 40, 41, 44-45, 45-46 48-49) Thus, the offenses occurred at the same time and place.

Second, statutes prohibiting unlawful controlled substance possession protect the general public. State v. Denny, 173 Wn. App. 805, 809, 294 P.3d 862 (2013) (citing State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (2000); RCW 69.50.607). Therefore, the general public is the victim of both of Camacho's unlawful possession offenses, and the same victim element is met.

Finally, the same intent element is also met. In State v. Garza-Villarreal, the defendant was convicted of one count of possession with intent to deliver cocaine and one count of possession with intent to deliver heroin. 123 Wn.2d 42, 49, 864 P.2d 1378 (1993). On appeal, the Court addressed the same intent element, and found that "[t]he possession of each drug furthered the overall criminal objective of delivering controlled substances in the future. Thus, Garza-Villarreal's convictions were for crimes committed in furtherance of the same objective criminal intent." 123 Wn.2d at 49.

The Court went on to hold that simultaneous possession with intent to deliver two different drugs constitutes the same criminal conduct. Garza-Villarreal, 123 Wn.2d at 49; see also Vike, 125 Wn.2d at 412-13.

Because existing case law provides conclusive support for the argument that Camacho's two convictions for unlawful possession of a controlled substance with intent to deliver were the same criminal conduct, trial counsel's failure to make the argument at sentencing was ineffective. And it is not clear from the record in this case that the trial court would have imposed the identical sentence if it had before it the correct sentencing information and offender score.

Accordingly, Camacho's case should be remanded for resentencing. *See* State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); Saunders, 120 Wn. App. at 825 (counsel's decision not to argue same criminal conduct as to rape and kidnapping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing).

D. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT CAMACHO'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LFOS.

The trial court ordered Camacho to pay legal costs in the amount of $5,800.00, which included discretionary costs of $2,500.00 for appointed counsel and defense costs and $2,500.00 in unspecified fines. (10RP 19; CP 120)

The Judgment and Sentence includes the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 119) But there was no discussion on the record regarding

Camacho's ability to pay.

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [t]he court **shall not** order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 (3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and the record must reflect this inquiry. State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Hence, the trial court was without authority to impose LFOs as a condition of Camacho's sentence if it did not first take into account his financial resources and the individual burden of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider

the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

Recently, in Blazina, our State Supreme Court decided to address a challenge to the trial court's imposition of LFOs, notwithstanding the defendant's failure to object below, because of "[n]ational and local cries for reform of broken LFO systems" and the overwhelming evidence that the current LFO system disproportionately and unfairly impacts indigent and poor offenders. 182 Wn.2d at 835.[20] The Blazina court also noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Here, Camacho was found indigent for both trial and on appeal. (CP 134-

[20] The Blazina Court "exercise[d] its RAP 2.5(a) discretion" to reach the merits of the issue, despite the lack of objection at sentencing. 182 Wn.2d at 835. RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. This Court may also reach the merits of this issue under RAP 2.5(a) despite Camacho's failure to object to the imposition of discretionary costs below.

35, 138)

The record does not establish the trial court actually took into account Camacho's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. And the trial court made no further inquiry into Camacho's financial resources, debts, or future employability. Because the record fails to establish that the trial court individually assessed Camacho's financial circumstances before imposing LFOs, the court did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

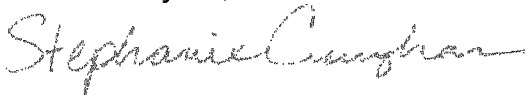
V. CONCLUSION

A canine sniff of an automobile is an obtrusive method of inspecting an automobile's contents and an improper invasion of an individual's private intimate affairs. Canine Barney's sniff of the vehicles in this case constituted an unlawful warrantless search that cannot provide a basis for the search warrant. Furthermore, canine sniffs in general, and Barney's sniffs in particular, are not reliable enough to establish probable cause for a search warrant. Accordingly, the trial court should have suppressed all of the evidence found during the execution of the invalid search warrant,

and Camacho's convictions must be reversed.

Furthermore, simultaneous possession of two different controlled substances with intent to deliver are the same criminal conduct for the purpose of calculating an offender score. Camacho therefore received ineffective assistance of counsel when his attorney failed to argue that the two convictions constituted the same criminal conduct. Accordingly, Camacho's case should be remanded for resentencing with an offender score of zero and so that the trial court can properly consider his ability to pay LFOs.

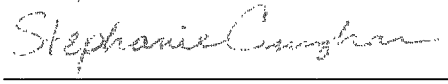
DATED: July 20, 2015



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Guadalupe C. Camacho

CERTIFICATE OF MAILING

I certify that on 07/20/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Guadalupe C. Camacho #369755, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

COMPLAINT FOR SEARCH WARRANT
(Evidence)

STATE OF WASHINGTON } ss. **No.** _____

County of Pierce

COMES NOW Officer Kenneth P. Smith #200 being first duly sworn, under oath, deposes and says:

That on or about the 17th day of May, 2012 and continuing to the present in Pierce County, Washington, a felony, to-wit: Unlawful Delivery/Possession of a Controlled Substance was committed by the act, procurement or omission of another, that the following evidence, to-wit:

1. **Methamphetamine and/or any other controlled substance manufactured distributed, dispensed, acquired or possessed;**
2. **Equipment, products, and materials of any kind which are used, or intended for use, in the manufacturing, compounding, processing, delivering, packaging, importing or exporting of Methamphetamine, and/or any controlled substances;**
3. **Property used, or intended for use, as a container for property described in items 1 and 2 above;**
4. **Conveyances, including aircraft, vehicles or vessels which are used or intended for use, in any manner to facilitate the sale, delivery, or receipt of property described in items 1 and 2 above;**
5. **Books, records, receipts, notes, ledgers, research products and materials, papers, microfilms, video/audio tapes, and photographs (developed and undeveloped);**
6. **Drug Paraphernalia;**
7. **Moneys, negotiable instruments, securities, stolen property, or other tangible or intangible property of value which is furnished, or intended to be furnished, by any person in exchange for Methamphetamine and/or any controlled substance;**
8. **Tangible and intangible personal property, stolen property, proceeds or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges for Methamphetamine, and/or any controlled substances;**
9. **Moneys, Negotiable instruments, and securities used, or intended for use to facilitate the furtherance of the violations listed above;**
10. **Firearms, pistols, rifles, and/or any other dangerous weapons defined in Chapter 9.41 RCW which are possessed, used, or intended for use, in the furtherance of the violations listed above;**
11. **Computers and equipment including hard drives, floppy disks, monitors, keyboards, printers, software and/or computer manuals used, or intended for use, in the furtherance of the violations listed above;**
12. **Digital pagers, cellular telephones, answering machine tapes, telephone caller I.D. readouts, and any other communications equipment used, or intended for use, in the furtherance of the violations listed above;**

13. The contents of digital pagers, cellular telephones, answering machine tapes, telephone caller I.D. readouts, and any other communications equipment used, or intended for use, in the furtherance of the violations listed above;
14. Indicia of occupancy, residency and/or ownership of the premise described in this search warrant including, but not limited to, utility bills, telephone bills, cancelled envelopes, registration certificates and keys;
15. Addresses and/or telephone numbers of conspirators, drug associates, or any other people related to the manufacture, distribution, transportation, ordering, or purchasing of Methamphetamine, and/or any other controlled substances;

is material to the investigation or prosecution of the above described felonies for the following reasons:

they are evidentiary in nature and assist in proving the crime of Unlawful Delivery of a Controlled Substance.

Your affiant verily believes that above evidence is concealed in or about a particular house, person or place, to wit:

1. The residence of 9621 10th Ave E, believed to be unit number 9, within Pierce County, State of Washington. The unit is on the South end of an 8-plex apartment building, on the lower right hand side as facing. The building is tan in color with brown trim. The number 9621 are affixed to the building. A number on the suspect door was not visible. The complex is commonly known as the Midland Crest apartment complex.

2. A silver 2012 Nissan Altima, California 6TOC969 , registered to EAN Holdings LLC in Tulsa City OK.

3. A silver 2006 Nissan Altima, Oregon license 164-FDP, registered to Rosa Rivera-Hernandez at 1175 Orchard Ln.

4. A white 2003 Ford truck, California license 8X23764, registered to Jesus Mendez at 6720 S Victoria Ave in Los Angeles, CA.

5. A red 2003 Chrysler PT Cruiser, Washington license AHL-5416, registered to Guadalupe Cruz at 5514 So. Cheyenne St #F in Tacoma, Washington.

6. A blue 2000 Nissan Maxima, Washington license plate 836-WUQ, registered to Guillermo Madrigal-Cuevas at 710 E. Locust St in Waterville, Washington.

7. The address of 11021 Park Ave So. # E-104 in Pierce County, Washington. The complex is commonly known as the Westminster Towers complex. The unit is located on the ground floor of the complex on the right side as facing from a common breezeway. The complex contains several hundred units. The complex is light gray in color with dark gray trim. This is believed to be the residence of Miguel Salto-Aleman.

8. **Garage number "C-54" at the same apartment complex located at 11021 Park Ave So, commonly referred to as the Westminster Towers complex. The garage is rented by Miguel Salto-Aleman. The door is marked by "C-54" above the door.**

9. **Any vehicles registered to or under the control of the occupants of the above listed residences.**

in said county and state; that affiant's belief is based upon the following facts and circumstances:

On 05/16/2012, your affiant applied for and was granted a Pierce County Superior Court Search Warrant for 915 E Division Lane, Tacoma WA, a white 2004 Mitsubishi Galant 4-door, bearing WA license #ADV9039 and a blue 2007 Cadillac Escalade 4-door, bearing WA license #148ZZF.

On 05/17/2012, at about 1600 hours, your affiant and members of the Tacoma Police Special Investigations unit stopped the Galant at SR 167 and Willis St in Kent. Alfredo Flores was driving the vehicle and was detained. The vehicle was searched and a large quantity of methamphetamines and heroin were found in a sophisticated hidden compartment with an electric locking mechanism behind the dashboard. The search warrant was then served on the residence at 915 E Division Lane. Officers recovered over 2073 grams of methamphetamines, 875 grams of heroin, 11.3 grams of marijuana and a large sum of US currency between the vehicle and the residence.

Your affiant had been conducting surveillance on the residence, Flores and the Galant for several days. On 05/16/2012, at about 1030 hours, the Galant went to 9621 10th Ave, Tacoma WA 98444 and left at about 2235 hours.

Your affiant and Ofc. Walkinshaw have an on-going investigation in which 9621 10th Ave E is believed to be a narcotics stash house. Ofc. Walkinshaw received information from a testimonial informant who stated that he/she had been inside of apartment #9 about 6 months ago and observed a large quantity of methamphetamines and heroin, packaged for resell. The sources of the drugs were identified as Guadalupe Cruz Camacho and Miguel Salto Aleman and were known to use that apartment. Cruz was also known to drive a red PT Cruiser bearing WA #AHL5416, which was registered to him. Your affiant has observed that vehicle at 9621 10th Ave E on several occasions and as recently as 05/17/2012 and observed Cruz in the parking lot working on the engine areas of a Ford truck and a power blue Nissan Maxima with WA license #836WUQ.

Your affiant and Ofc. Walkinshaw contacted a confidential source on 05/17/2012, who identified Cruz from a DOL Photo as Flores' drug source. The confidential source stated that Cruz was known to drive a red PT Cruiser.

Over the last several weeks, your affiant and Ofc. Walkinshaw have conducted surveillance on Salto Aleman and know him to live at 11021 #E104 Park Ave S with Angelica Perez Martinez. Your affiant has observed Salto Aleman and Angelica Perez Martinez at this

apartment several times. Your affiant confirmed with apartment management that this apartment was rented to Salto Aleman and Angelica Perez Martinez along with garage/storage unit #54. Your affiant also found that Salto Aleman has DOL photos with two other names, Gerardo Rafael Hernandez and Angel Villegas Herrera. The testimonial informant stated that Salto Aleman was up from California and is now running a large scale drug operation in the Pierce County area.

At about 1930 hours, surveillance units responded to 9621 10th Ave E and conducted surveillance. The following vehicles were parked in front of #9 – a silver 2012 4-door Nissan Altima bearing CA license #6TOC969, a silver 2006 4-door Nissan Altima bearing OR license #164FDP, a white 2003 2-door Ford pick-up truck bearing CA license #8X23764 and the PT Cruiser listed above.

Surveillance units observed a group of about 4-5 Hispanic subjects moving packages into the engine compartment and interior doors of the Altima with California plates. It is your affiant's belief that by this time, the subjects may have been advised of the arrest of Flores and the seizure of the drugs/currency. It appeared that the subjects could have been loading the vehicle with drugs/currency. The group was seen entering apartment #9. Included in the group were two males that reasonably matched the descriptions of Cruz and Salto Aleman.

Tacoma Police K-9 Officer Betts used his K-9 partner and walked around the listed vehicles. Ofc. Betts advised to the presence of narcotics on the Altimas and the Ford truck.

At about 2210 hours, Ofc. Kim observed the group of males, a female and two children leave #9 and enter the Altimas and the Ford truck. Traffic stops were made on all three vehicles away from the apartments. Ofc. Betts again used his K-9 partner and stated that the narcotics dog alerted to the presence of narcotics on all three vehicles. Ofc. Betts also stated that the Ford truck appeared to have a "trap" panel on the rear bumper area with suspicious rivets in plain view. In plain view from the passenger's side rear window and on the floorboard, Sgt. Travis observed a plastic Safeway type bag full of money individually wrapped.

Both Salto-Aleman and Cruz have been the subject of extensive narcotics investigations by the Tacoma Police Department and the Drug Enforcement Administration.

The occupied were detained and identified as follows:

Oregon 2006 Altima –
Driver was Salto Aleman, passenger was Angelica Perez Martinez and two children.

California 2012 Altima –
Driver was Javier Espinoza.

California 2003 Ford truck –
Driver was Cruz, passenger was Hector Manuel Guicho Garcia.

The vehicles were taken to a secure garage pending search warrant. The males were transported to holding cells at the Tacoma Police Department. Perez and the children were taken to a private room at the police station.

Ofc. Betts responded to the front door of #9 and used his K-9 partner. Ofc. Betts stated that the narcotics dog alerted to the presence of narcotics from the front door of the apartment.

It is your affiant's belief that Cruz and Salto Aleman are in fact using 9621 10th Ave E #9, Tacoma Washington, 11021 Park Ave S #E104 and garage #54, Tacoma WA and is utilizing these houses and the listed vehicles to facilitate their narcotic distribution in Pierce County. It is your affiant's belief that evidence of their narcotics trafficking will be found in the residences and listed vehicles.

AFFIANT'S BACKGROUND AND EXPERIENCE

Your affiant, Officer Kenneth P. Smith, is a duly commissioned member of the Tacoma Police Department and is currently assigned the Special Investigations Division. Your affiant has been a commissioned member of the Tacoma Police Department since 2003. Prior to the Tacoma Police Department, your affiant was employed as a commissioned police officer with the City of Fife from 1999 until 2003. Your affiant's training includes attending the Basic Law Enforcement Academy, Basic Narcotics Investigations, Gang Investigations, Crime Scene Investigations and Criminal Investigations. In the past your affiant has been assigned as a uniformed patrol officer, a narcotics investigator and as a Gang Unit Officer. Your affiant has been a member of the Hazardous Environment and Tactics Team (HEAT Team) since 2008. This team's primary function is to investigate and process clandestine laboratories, with hundreds of drug related training hours. In addition to the listed training, your affiant has experience with literally hundreds of drug related investigations. Your affiant has initiated, planned, assisted in and executed in excess of 150 controlled substance search warrants that resulted in the arrest of suspects and the seizure of evidence. Your affiant has contacted, interviewed, and arrested many subjects for the possession, use, sale, distribution, delivery, and manufacture of controlled substances. Your affiant has become very educated, trained and experienced with the terms, trends, habits, commonalties, methods, and idiosyncrasies surrounding illicit drug possession, use, distribution, manufacture, business and culture. Based on your affiant's training and experience, and upon the training and experience of knowledgeable Law Enforcement Officers, with whom he associates with, your affiant recognizes that the listed items are evidence of the above listed violations for the following reasons:

1. **In addition to the controlled substances being sought in this search warrant, drug manufacturers, dealers and users often possess more than one controlled substance; for variety in personal use, to diversify and monopolize the illicit drug market, to supply a broader base of clients, and to maximize their potential profits;**
2. **Drug dealers, manufactures, and users will have materials, products, and equipment in their possession to further their business or habit. This could include, but is not limited to, precursor chemicals, glassware, tubes, growing apparatus and assorted cookware for manufacture of narcotics; bags, scales, and packaging materials for distribution of narcotics; and pipes, bongs, torches, and assorted drug paraphernalia for usage;**

3. Controlled substances are commonly hidden in various types and sizes of containers, which are often disguised to avoid detection;
4. Drug manufacturers, dealers, and users utilize theirs or other person's vehicles to conceal controlled substances, deliver drugs, transport their person to purchase drugs, transport coconspirators to purchase drugs, transport materials used in production, and to further their drug trade/habit;
5. Information regarding the manufacture, distribution, sale and use of controlled substances are found in books, records, receipts, notes ledgers, research products, papers, microfilms, video/audio tapes, films developed and undeveloped and other assorted media;
6. Drug manufacturers, dealers and users will trade, exchange, and sell anything for controlled substances including money, food stamps, food, electrical equipment, jewelry, clothing, stolen property, guns/firearms, other drugs, cigarettes and any tangible or intangible property;
7. Guns, firearms, rifles, pistols, shotguns, and all types of dangerous weapons are utilized by drug manufacturers, dealers, and users to protect themselves from robbery, police intervention, and for self defense; to protect their profits, assets, and narcotics; and to assist in the furtherance of their drug habits;
8. Computers are used to log delivery records, gain media access to information, communicate with coconspirators, transfer funds, store information, and enhance the efficiency of controlled substance transactions;
9. Digital pagers, telephones, cellular phones and other communications equipment assist manufactures to negotiate deals, contact coconspirators, conduct business transactions, and communicate with potential customers;
10. Papers showing ownership, residency, occupancy and other indicia corroborate the length of time narcotics activity has occurred, location of occurrence, coconspirator's involvement, and constructive possession of evidence;
11. Drug manufacturers, dealers and users commonly keep the names, addresses, and phone numbers of other conspirators, drug associates, and sources for equipment, chemicals or other controlled substances. This information is valuable in the furtherance of other related drug and/or controlled substance investigations.

Your affiant believes that items of evidentiary value will be found at the residences and vehicles for the following reasons.

1) Drug traffickers often place assets in names other than in their own in order to avoid detection, seizure, and forfeiture of these assets by law enforcement. Even though these assets are in other people's names, the traffickers continue to use these assets and exercise dominion and control over them.
2) Drug traffickers maintain books, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, possession, sale and distribution of narcotics. These books, records, receipts, ledgers and other documentation are usually maintained at suspect's residences and in their vehicles.
3) It is common for drug traffickers to maintain contraband, proceeds of narcotics transactions, and records of narcotics transactions in secure locations within their residences, vehicles and/or businesses for ready access and to conceal them from law enforcement.
4) Drug traffickers commonly maintain books, ledgers, computer disks, cellular telephone memory or papers which reflect names, addresses and telephone numbers of their associates in the drug trafficking organizations.
5) Drug traffickers usually keep paraphernalia for packaging, weighing and distributing

their narcotics. That paraphernalia includes, but is not limited to scales, plastic bags, other packaging materials and weapons for protection of the criminal enterprise.

6) Drug traffickers attempt to legitimize their profits from the sales of narcotics. To accomplish this they utilize foreign and domestic banking institutions, real estate and businesses, both real and fictitious.
7) Persons involved in narcotics trafficking frequently conceal and maintain at their residences, in their vehicles and in their businesses caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry, vehicles, boats and trailers, home furnishings, entertainment systems and other items of value which are proceeds of drug transactions and evidence of consequential financial transactions relating to narcotic trafficking activities.
8) It is common for drug traffickers to take photographs and/or video recordings of themselves, their associates, their property and their illegal produces. These pictures/recordings are commonly maintained in their residences.

Tacoma Police K9 Barney and Handler Henry Betts
Certified Narcotic Detection Team Information

Police Service Dog Barney was certified with his handler, Officer Henry Betts, by the Washington State Criminal Justice Training Center on October 12, 2010 after successfully completing required training and certification testing. K9 Barney and Handler Betts were further certified by the Washington Police Canine Association on December 2nd, 2010. K9 Barney is trained to detect the odor of five controlled substances: Marijuana, Crack Cocaine, Powder Cocaine, Heroin and Methamphetamines.

Police Dog Barney and Handler Betts continue to do in-service training and maintenance training weekly as a Narcotic Detection Team.

Narcotic Detector Team Betts and K9 Barney have recorded over 20 'Finds'(2012) year to date which include over 500 grams of Marijuana, 50 grams of Powder Cocaine, 50 grams of Crack Cocaine, 200 grams of Heroin and 50 grams of Methamphetamines.

K9 Barney and Handler Betts train weekly on all odors the dog is trained to detect. This training is constantly on-going and averages 24 hours a month. Barney's on-going training includes:

1. Training in all areas of interdiction such as vehicles, boats, trailers, parcels, storage areas, motels, residences etc;
2. Training on various quantities of controlled substances, ranging from grams to pounds;
3. Training on novel odors such as odors that are distracting, masking or new;
4. Training on controlled negative (blank) testing in which all objects or locations have no contraband / narcotics present;
5. Extinction training, which proofs the dog and prevents him from alerting to common items associated with controlled substances such as plastic bags etc.

Officer Betts maintains weekly training logs of the on-going training and active working search logs. These logs are updated weekly.

Narcotic detector dog Barney is trained to detect the odors of Marijuana, Heroin, Methamphetamine, Cocaine and Crack Cocaine. Once Barney detects one of the odors he shows a change of behavior, increased sniffing/breathing, increased tail wag, change in muscle tension and increased drive. Then he is trained to locate the source of the odor. Once he locates the source he momentarily puts his nose on it, then sits and looks at me, (Positive/Final response). This response may also indicate items recently contaminated with, or associated with, the odor of one or more of the controlled substances.

RELIABILITY OF INFORMANT

The CI's credibility, veracity and knowledge is based on the following: The CI has been observed conducting over 20 drug transactions and has provided detailed information how drugs are bought and sold. He/she has extensive knowledge of how the local and regional drug markets operate. He has provided detailed information on other co-conspirators that has been independently confirmed by your Affiant. The CI is facing a considerable prison sentence if he/she were charged in connection with a related investigation. The CI is cooperating and making statements against his/her own interest for consideration of assistance with his/her own drug case. The CI returned to your Affiant a very sensitive piece of law enforcement equipment. The CI was under no pressure to return this piece of equipment and could have easily maintained possession of the item. The independent return of this equipment further displays the CI's reliability and willingness to cooperate with Law Enforcement. Your Affiant believes that his/her knowledge is extensive regarding drug trafficking.

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Officer Kenneth P. Smith #200

SUBSCRIBED AND SWORN to before me this 18 day of May, 2012.

Pierce County Superior Court Judge / Commissioner

CUNNINGHAM LAW OFFICE

July 20, 2015 - 3:55 PM

Transmittal Letter

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